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09/837,739	04/06/2001	Jim Reich	540606-2001	9745

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NEW YORK, NY 10151

EXAMINER

BOYD, JENNIFER A

ART UNIT	PAPER NUMBER
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1771

DATE MAILED: 02/24/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/837,739

Applicant(s)

REICH, JIM

Examiner

Jennifer A. Boyd

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 28 November 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 15 - 17, 19 - 21, 23 - 35 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 15 - 17, 19 - 21, 23 - 35 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Response to Amendment

1. The Applicant's Amendments and Accompanying Remarks, filed November 28, 2005, have been entered and have been carefully considered. Claims 26 – 28 are amended, claims 29 – 35 are added and claims 15 – 17, 19 – 21 and 23 – 35 are pending. In view of Applicant's amendment to claims 25 – 28, the Examiner withdraws the 35 USC 112, 2nd paragraph rejection as detailed in the previous Office Action. In light of Applicant's newly added claims, the Examiner has revised the previously applied rejections below. The invention as currently claimed is found to be unpatentable for reasons herein below.

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

4. Claims 29 – 34 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

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5. As to claims 29 – 33, the limitation of “wherein the polyester fiber and the acetate fiber are not microfibers” is not supported by the Specification. In regards to polyester fiber size, the Specification states on page 15 that “polyester fibers include, for examples, those with a range of about 70 – 300 denier; single strand or plied; and conventional or *microdenier*”. In regards to acetate fiber size, the Specification states that the “the fiber is made in 55/20, 75/20, 100/40 and 150/40 deniers” and that “factors in choosing an acetate include...its availability in sizes that allow for desirable overall blend levels”. The phrase “polyester and acetate fiber are not microfibers” is new matter, because this negative limitation is not literally supported by the specification. *Ex Parte Grasselli*, 231 USPQ 393. Contrary to the applicant’s statement in the present response, this limitation is not supported by the specification. Although the Specification suggests using fibers of a large size, which would not classify as microfibers, the Specification does not support excluding microfibers. Such a provision contradicts the teachings of the Specification and therefore fail to find support therein.

6. As to claim 34, the limitation of “the polyester fiber and acetate fiber are entwined by air-entanglement such that the resulting combination comprises only acetate fibers around a polyester fiber core”. In regards to yarn structure, the Specification states on page 16 that “the acetate and polyester fibers are preferably combined by air entanglement”. It should be noted that the Specification does not specify that only acetate fibers are around a polyester fiber core. Applicant indicates that support for the claim can be found in the Figures. The Examiner has reviewed the Figures and has found no basis for support. Please indicate which Figure(s) and explain.

Claim Rejections - 35 USC § 103

7. Claims 15 – 16, 19, 23, 25 – 28 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Clarke (US 6,258,455).

Clarke is directed to an antimicrobial ultra-microfiber cloth (Title).

As to claims 15, 23 and 27 - 28, Clarke teaches a material produced by combining ultra-microfiber yarns with yarns of antimicrobial fiber such as an acetate fiber sold under the name MICROSAFE (column 3, lines 1 – 15). Clarke teaches that the yarn may additionally comprise polyester to increase the strength of the yarn (column 3, lines 15 – 20). Clarke teaches that the material can woven or knitted (column 1, lines 5 – 10).

As to claim 16, Clarke teaches that MICROSAFE fibers can be used as the anti-microbial fiber (column 4, lines 15 – 30), which is known in the art to contain triclosan.

As to claim 19, Clarke teaches that the antimicrobial fibers and ultra-microfibers can be intermixed by air jet texturing (column 3, lines 60 – 67).

As to claims 15, 23 and 27 - 28, Clarke discloses the claimed invention except for that the antimicrobial acetate fiber is present in the amount of at least 25% by weight of the fabric. It should be noted that the amount of antimicrobial acetate fiber in the fabric is a result effective variable. Clarke teaches that it is preferable that approximately 18% of the total material comprises acetate antimicrobial fiber (column 4, lines 8 – 12). However, Clarke notes that higher and lower concentrations of antimicrobial fiber may be acceptable in particular circumstances (column 4, lines 16 – 19). For example, as the level of antimicrobial acetate increases, the fabric becomes more effective in destroying bacteria. It would have been obvious to one having

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ordinary skill in the art at the time the invention was made to create a material with antimicrobial acetate fiber present in the amount of 25% of the total weight of the fabric since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980). In the present invention, one would have been motivated to optimize the percentage of antimicrobial acetate based on the desired application of the material.

As to claims 25 – 28 and 35, although Clarke does not explicitly teach the fabric reduces odors by about 33% or more when compared to a non-odor reducing fabric as required by claims 25 – 28 and acetate fiber having blended therein an anti-microbial where the anti-microbial is effective after 200 industrial washings as required by claim 35, it is reasonable to presume that the fabric reduces odors by about 33% or more when compared to a non-odor reducing fabric as required by claims 25 – 28 and acetate fiber having blended therein an anti-microbial where the anti-microbial is effective after 200 industrial washings as required by claim 35 is inherent. Support for said presumption is found in the use of like materials (i.e. a woven or knitted fabric comprising air jet textured yarns comprising polyester and MICROSAFE acetate fibers, where the amount of MICROSAFE fibers are optimized to at least 25% by weight of the fabric) which would result in the claimed properties. The burden is upon the Applicant to prove otherwise. *In re Fitzgerald* 205 USPQ 594. In addition, the presently claimed properties would obviously have been present once the Clarke product is provided. Note *In re Best*, 195 USPQ at 433, footnote 4 (CCPA 1977).

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8. Claims 20 – 21 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Clarke (US 6,258,455) in view of Newman (US 6,000,057).

Clarke teaches the claimed invention above except fails to teach that the fabric is an odor-reducing fabric for use in an odor-reducing hunting garment.

Newman is directed to odor preventing hunting apparel (Title). Newman teaches a fabric for use in the construction of hunting clothing, preferably undergarments such as T-shirts, briefs, socks, thermal underwear, gloves, hats, scarves etc. having directed and intimate contact with the skin (column 1, lines 50 – 55). Newman teaches that the clothing is effective for preventing the growth and reproducing of odor-producing bacteria on the body, and thereby reducing body odor, by simply wearing the antimicrobial clothing (column 2, lines 1 – 5). Newman teaches that antimicrobial fabric such as those available from Microban Products Company under the MICROBAN mark, such as MICROSAFE fabric is suitable for the inner layer of fabric in the piece of clothing (column 1, lines 55 – 60).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the material of Clarke as the inner layer of fabric in the odor preventing hunting apparel of Newman motivated by the desire to use an anti-microbial fabric with MICROSAFE fibers as desired by Newman which is high strength due to the integration of polyester fibers to create a durable garment.

9. Claims 15 – 17, 19, 23, 25 – 33 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gurian (US 5,856,005).

Gurian is directed to a permanently anti-microbial and flame-retardant yarn and fabric

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made therefrom (Title).

As to claims 15, 23 and 27 - 28, Gurian teaches a yarn with base filaments formed of a plurality of the permanently flame-retardant filaments and a pair of effect filaments – one of the plurality of permanently flame-retardant filaments and one of the plurality of permanently anti-microbial filaments (column 3, lines 23 – 45). Gurian teaches that the permanently flame-retardant filaments are made of polyester and available under the trade name TREVIRA (column 4, lines 30 – 38). Gurian teaches that the permanently anti-microbial filaments are formed of cellulose acetate permanently impregnated with up to 2% by weight of chlorinated phenoxy compound available under the trade name MICROBAN B as an anti-microbial agent (column 4, lines 15 – 30). It should be noted that the preferred anti-microbial filaments are available under the trade name MICROSAFE acetate (column 4, lines 20 – 25). Gurian teaches that the yarn can be incorporated into a knitted or woven fabric (column 4, lines 53 – 60). Gurian teaches that the fabric comprises at least 5% by weight of the anti-microbial filaments (column 4, lines 60 – 65). It should be noted that Gurian does not define an upper limit.

As to claim 16, Gurian teaches that MICROBAN can be used as the anti-microbial agent (column 4, lines 15 – 30), which is known in the art to be a form of triclosan.

As to claim 17, Gurian teaches the use of Hoechst-Celanese T692 SD (semi-dull) polyester (column 5, lines 40 – 45).

As to claim 19, Gurian teaches that the permanently flame-retardant filaments and permanently anti-microbial filaments air jet textured to create yarns (column 4, lines 45 – 50).

As to claims 29 – 33, Gurian teaches in the Examples that the core or base filament is 150/60 semi-dull polyester and the second effect filaments were 75/40 MICROSAFE cellulose

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acetate (column 5, lines 40 – 50). It should be noted that “150/60” means a yarn comprising 60 – 150 denier filaments and “75/40” means a yarn comprising 40 – 75 denier filaments. The Examiner submits that 150 denier and 75 denier filaments would meet Applicant’s requirement of the polyester and the acetate fibers not being microfibers.

As to claims 15, 23 and 27 – 28, Gurian discloses the claimed invention except for that the fabric comprises at least 25% anti-microbial acetate filaments by weight of the fabric. It should be noted that the amount of antimicrobial acetate filaments is a result effective variable. For example, as the amount of antimicrobial fibers increase, the fabric exhibits more anti-microbial characteristics. It would have been obvious to one having ordinary skill in the art at the time the invention was made to create a fabric comprising at least 25% by weight of anti-microbial acetate filaments, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980). In the present invention, one would have been motivated to optimize the amount of anti-microbial filaments to create a fabric having suitable anti-microbial properties.

As to claims 25 – 28 and 35, although Gurian does not explicitly teach the fabric reduces odors by about 33% or more when compared to a non-odor reducing fabric as required by claims 25 – 28 and acetate fiber having blended therein an anti-microbial where the anti-microbial is effective after 200 industrial washings as required by claim 35, it is reasonable to presume that the fabric reduces odors by about 33% or more when compared to a non-odor reducing fabric as required by claims 25 – 28 and acetate fiber having blended therein an anti-microbial where the

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anti-microbial is effective after 200 industrial washings as required by claim 35 is inherent.

Support for said presumption is found in the use of like materials (i.e. a woven or knitted fabric comprising air jet textured yarns comprising polyester and MICROSAFE acetate fibers, where the MICROSAFE fibers are present in the amount of at least 5% by weight) which would result in the claimed property. The burden is upon the Applicant to prove otherwise. *In re Fitzgerald* 205 USPQ 594. In addition, the presently claimed properties would obviously have been present once the Gurian product is provided. Note *In re Best*, 195 USPQ at 433, footnote 4 (CCPA 1977).

10. Claims 20 – 21 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gurian (US 5,856,005) in view of Newman (US 6,000,057).

Gurian teaches the claimed invention above except fails to teach that the fabric is an odor- reducing fabric for use in an odor-reducing hunting garment.

Newman is directed to odor preventing hunting apparel (Title). Newman teaches a fabric for use in the construction of hunting clothing, preferably undergarments such as T-shirts, briefs, socks, thermal underwear, gloves, hats, scarves etc. having directed and intimate contact with the skin (column 1, lines 50 – 55). Newman teaches that the clothing is effective for preventing the growth and reproducing of odor-producing bacteria on the body, and thereby reducing body odor, by simply wearing the antimicrobial clothing (column 2, lines 1 – 5). Newman teaches that antimicrobial fabric such as those available from Microban Products Company under the MICROBAN mark, such as MICROSAFE fabric is suitable for the inner layer of fabric in the piece of clothing (column 1, lines 55 – 60).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to use the material of Gurian as the inner layer of fabric in the odor preventing hunting apparel of Newman motivated by the desire to use an anti-microbial fabric with MICROSAFE fibers as desired by Newman which is high strength due to the integration of polyester fibers to create a durable garment.

Response to Arguments

11. Applicant's arguments filed November 28, 2005 have been fully considered but they are not persuasive.

In view of Applicant's amendments to claims 25 – 28, the Examiner has withdrawn the 35 USC 112, 2nd paragraph rejection as detailed in the previous Office Action.

Applicant argues that the microfibers in the material of Clarke would make it not suitable for use the present invention. Applicant argues that the microfibers would provide a very absorbent material which has a soft and silky feel while the hunting garment of the Applicant requires a fabric that is not highly absorbent and wherein strength and stability are of great importance. Applicant's arguments are not commensurate in scope with the independent claims which do not claim hunting apparel or its performance requirements. Furthermore, in regards to claims 20 and 21, which do claim a "hunting garment", it should be noted that Applicant's arguments cannot suffice as evidence. The Applicant must submit evidence to show that the microfiber fabric of Clarke cannot function as a hunting garment fabric. It should be noted that Applicant's Specification suggests that microdenier filaments can be used for the polyester fibers, which appears to conflict with Applicant's arguments. Alternatively, the Applicant should

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further amend the claims to have limitations that would physically differentiate the fabric of the Clarke from the fabric of the Applicant.

Applicant argues that there is no motivation to incorporate the microfiber cloth of Clarke into a fabric for use in hunting garments. The secondary reference, Newman, is directed to odor preventing hunting apparel (Title). Newman teaches a fabric for use in the construction of hunting clothing, preferably undergarments such as T-shirts, briefs, socks, thermal underwear, gloves, hats, scarves etc. having directed and intimate contact with the skin (column 1, lines 50 – 55). Newman teaches that the clothing is effective for preventing the growth and reproducing of odor-producing bacteria on the body, and thereby reducing body odor, by simply wearing the antimicrobial clothing (column 2, lines 1 – 5). Newman teaches that antimicrobial fabric such as those available from Microban Products Company under the MICROBAN mark, such as MICROSAFE fabric is suitable for the inner layer of fabric in the piece of clothing (column 1, lines 55 – 60). Newman provides motivation to incorporate the MICROSAFE fabric of Clarke into a hunting garment by suggesting that any antimicrobial fabric having MICROSAFE fibers would be suitable. It should be noted that, under Section 103, the obviousness of an invention cannot be established by combining the teachings of the prior art references absent some teaching, suggestion or incentive supporting the combination. *ACS Hospital Systems, Inc. v. Montefiore Hospital*, 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984). This does not mean that the cited prior art references must specifically suggest making the combination. *B.F. Goodrich Co. v. M Aircraft Braking Systems Corp.*, 72 F.3d 1577, 1582, 37 USPQ2d 1314, 1318 (Fed. Cir. 1996); *In re Nilssen*, 851 F.2d 1401, 1403, 7 USPQ2d 1500, 1502 (Fed. Cir. 1988)). Rather, the test for obviousness is what the combined teachings of the prior art references would

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have suggested to those of ordinary skill in the art. *In re Young*, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991); *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

This test requires us to take into account not only the specific teachings of the prior art references, but also any inferences which one skilled in the art would reasonably be expected to draw therefrom. *In re Preda*, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968).

Applicant argues that the fabric of the present invention is more successful at reducing odor than the ContainTM used in Newman and will be submitting a Declaration by the inventor that describes comparative tests between the fabric of the present invention, traditional fabric and that of the ContainTM line. The Declaration has not been received rendering Applicant's comments moot. It should be noted that the Examiner has not relied on Newman to teach the fabric having odor-reducing properties but only to provide motivation to incorporate the fabrics of Clarke and Gurian into the hunting garment of Newman. Therefore, a showing that the fabric of Newman is not as successful as the fabric of the instant invention at reducing odors is considered irrelevant.

In response to Applicant's argument that an increase in the percent by weight of the acetate in the fabric of Gurian, i.e., up to 25% by weight, would likely lead to the loss of flame-retardant properties of the fabric and render the invention of Gurian inoperable, the Examiner cannot question the validity of the disclosure of the patent. The Examiner agrees that Gurian discloses examples where a fabric is comprised of 94% polyester and 6% acetate and another fabric is comprised of 91% flame-retardant polyester and 9% acetate. Although the examples only suggest using 6% in one example and 9% in another example, they should be only treated as examples. It should be noted that disclosed examples and preferred embodiments do not

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constitute a teaching away from a broader disclosure or nonpreferred embodiments. *In re Susi*, 440 F.2d 442, 169 USPQ 423 (CCPA 1971). It would be improper to ignore the complete disclosure of the patent. It should be noted that Gurian discloses the use of at least 5% by weight and provides **no upper limit** for the weight percentage of anti-microbial filaments in the fabric (column 4, lines 53 – 65). The Exhibits have been reviewed by the Examiner. The Examiner submits that the Exhibits are irrelevant because the disclosure of the Gurian patent specifically states the use of at least 5% by weight. Although DesignTex might not sell flame-resistant and anti-microbial fabric having a content more than 11%, it does not suggest that the patent to DesignTex did not intend to claim at least 5% by weight with no upper bound. Additionally, the Exhibits do not suggest that 11% is the functional upper limit. The Exhibits only indicate that the product niche of DesignTex needs only 11% anti-microbial fibers or less.

Applicant argues that Gurian does not teach the limitations of newly added claim 34. The Examiner agrees, however, the Examiner submits that the Applicant does not have any support for this claim and the limitations are considered to be new matter.

Applicant argues that Gurian does not teach the limitations of newly added claim 35. Claim 35 states that “the acetate fiber having blended therein an anti-microbial is effective as an anti-microbial after 200 industrial washings”. In column 4, lines 65 – 68 and column 5 of Gurian, Gurian states that “the fabric according to the present invention is characterized by the *ability* to pass both the flame-retardancy tests and anti-microbial tests, both after a single commercial laundering and after 100 commercial launderings”. It should be noted that Gurian states that the fabric is able to pass the anti-microbial test after 100 commercial launderings. The Examiner submits that this does not mean that the fabric would not pass the anti-microbial test after 200

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commercial launderings as required by Applicant's claim 35. The Examiner submits that based on having the same physical and chemical characteristics that the ability to pass the anti-microbial test after 200 commercial launderings would be inherent to Gurian unless proven otherwise. The Examiner submits the same argument for the Clarke reference.

Conclusion

12. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

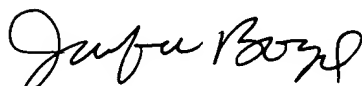
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jennifer A. Boyd whose telephone number is 571-272-1473. The examiner can normally be reached on Monday thru Friday (8:30am - 6:00pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached on 571-272-1478. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Jennifer Boyd
February 7, 2006



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SUPERVISORY PATENT EXAMINER
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